US Supreme Court

Case: *Virginia v. Black*, 538 U.S. 343 (2003)
Date: April 7, 2003 **Votes:** 7-2

Opinion: O'Connor (Rehnquist, Stevens, Scalia, Breyer joined wrt Parts I-III; Scalia didn't join Parts IV & V.)

Concurrence: Stevens

Concurrence/Dissents: Scalia (with Thomas, in part); Souter (with Kennedy and Ginsburg)

Dissent: Thomas

Tags: Virginia, cross burning, true threat, First Amendment, intent to intimidate, protected speech

Question(s) Presented: Was Virginia's statute against cross-burning constitutional, or did it chill free speech and violate the First Amendment?

Holdings: VA's statute does violate the First Amendment because it is too broad. Cross burners' convictions are vacated. [Actually it's hard to figure out what the holdings were, exactly, because different groups of Justices agreed with different things.]

Rationale: A state may prohibit cross burning *with intent to intimidate*, but the statute should not declare all cross burnings prima facie evidence of intent to intimidate.

Facts: Respondent Black convicted of cross burning in VA in 1998 at a KKK rally. Jury was instructed that the burning of the cross was sufficient evidence to infer intent. Two others burned cross in A.A. neighbor's yard.

Legal History, Prior Appeals & Trial Court Input:

- **Black's case:** trial court jury was instructed as to presumption of intent to intimidate (from VA statute); convicted.
- **Other cases:** trial court jury was not instructed re. VA statute's presumption of intent; convicted.
- **Court of Appeals of VA (2000):** affirmed convictions.
- **VA Supreme Court (2001):** cases consolidated and court determined that statute was facially unconstitutional, per *R. A. V.* – discriminates on the basis of content, is overbroad because presumptive of intent; may chill free expression.

Relevant American History:

- **1866:** KKK began in Pulaski, TN
- **KKK Act 1871:** President Grant used this to curtail KKK in South Carolina.
- **1905** publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Depicted ahistorical cross burnings.
- **1915:** book became movie, Birth of a Nation—cross burning became tied with KKK in American imagination. In Nov. of this year second KKK began.
- "From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology." (354)
- **1950:** first version of cross burning statute in VA.
- **1954:** *Brown v. BOE* decision sparked more KKK violence.
- **1968:** VA added prima facie cross-burning provision to statute

Appeals to Statute & Precedent:

- **Va. Code Ann. § 18.2-423 (1996):** bans cross burning with an intent to intimidate a person or group of persons. "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."
- ***Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 771 (1995):** The burning of a cross is a "symbol of hate"
- ***Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942):** gov't can regulate certain content of speech.
- ***Watts v. United States*, 394 U. S. 705 (1969):** true threats are not protected speech
- ***R. A. V. v. St. Paul*, 505 U. S. 377 (1992):** state may not proscribe speech it doesn't like; protected expression need not be speech. But "[w]e did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech." *Black*, at 361.
    - From Souter's concurrence-dissent: "The ordinance struck down in *R. A. V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative 'on the basis of race, color, creed, religion, or gender.'" (at 381, quoting St. Paul, Minn., Legis. Code § 292.02 (1990))
- ***Abrams v. U.S.*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting):** protection of speech for free trade in ideas, even those that are distasteful to people
- ***Texas v. Johnson*, 491 U. S. 397, 414 (1989):** gov't can't prevent speech just because it is distasteful
- ***Whitney v. CA*, 274 U. S. 357, 374 (1927) (Brandeis, J., concurring):** State can't prohibit speech even if it's socially abhorrent.
- ***U.S. v. O'Brien*, 391 U. S. 367, 376-377 (1968):** Draft card burning
- ***Tinker v. Des Moines*, 393 U. S. 503, 505 (1969)**
- ***Cohen v. CA*, 403 U. S. 15, 20 (1971):** fighting words
- ***Brandenberg v. OH*, 395 U. S. 444, 447 (1969) (per curiam):** State can only proscribe advocacy of law violation if the speech is directed to producing the lawlessness

- ***Madsen v. Women's Health Center, Inc.*, 512 U. S. 753, 774 (1994):** proximity limits to clinic during protests challenged as violations of free speech; true threats
- ***Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 797 (1984):** a statute against certain content or symbolic speech may generally chill the expression of ideas.

Dicta/Discussion:

- "Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings." (356)
- "…while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed." (357)
- "In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives." (357)
- "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (359)
- Majority disagrees with VA Supreme Court's conclusion that "once a statute discriminates on the basis of [symbolic expression], the law is unconstitutional." (361)
    - Re. *R. A. V.*: "some types of content discrimination did not violate the First Amendment." (361)
    - Some kinds of content are across-the-board proscribable, like threats against the president or obviously offensive obscenity, or cross burning *with intent to intimidate*.
- "As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. **The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.**" (365)
- **"The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech."** (365)

Concurrence: Stevens

- Cross burning with the intent to intimidate counts as unprotected speech. This part of the VA statute is sound, even though it's narrowly tailored to only this kind of expressive conduct.

Concurrence-Dissent: Scalia (with Thomas)

- Agrees that cross burning with an intent to intimidate is unprotected speech.
- There's a better interpretation of that prima facie provision, so it shouldn't be facially invalidated:
    - Prima facie evidence is sufficient to establish a given fact (presumption of a given fact) (e.g., possession of "burglarious" tools is to be considered prima facie evidence of intent).
    - "The established meaning in Virginia, then, of the term 'prima facie evidence' appears to be perfectly orthodox: It is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted." (369-70)
    - Doesn't think that VA SC interpreted statute to mean there couldn't be a rebuttal.
    - **"That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal."** (371, emphasis original)
- So actually the VA statute is NOT unconstitutional.
- Critical of VA-SC's "overbroad" conclusion about the statute: it's only overbroad if it makes unlawful a large area of protected speech, not that individuals who engage in the speech might end up arrested and prosecuted. But plurality of SCOTUS also makes the mistake of concluding "that the *possibility* of such convictions justifies the facial invalidation of the statute." (373)
- There's only a few cases in which the statute, properly interpreted, would violate a defendant's constitutional rights: if they'd burned a cross publicly, didn't intend to intimidate, are charged and prosecuted, and refuse to present a defense (so the prima facie evidence convicts them because not rebutted). (Not a big enough population to warrant invalidating the statute on its face.)
- "I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction." (376)
    - Could be a bad precedent: any judge's quirky interpretations of a statute could render that statute invalid!
- Plurality jumped the gun on declaring statute unconstitutional: the VA-SC didn't even say that the jury couldn't consider rebuttal evidence to the prima facie evidence provision.
- "Words cannot express my wonderment at this virtuoso performance." (379)

Concurrence-Dissent: Souter (with Kennedy and Ginsburg)

- VA's statute is unconstitutional no matter how you slice it because it "selects a symbol with particular content from the field of all proscribable expression meant to intimidate." (381)
- "The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment." (383)
- "A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the

particular message of white supremacy that is broadcast even by nonthreatening cross burning." (384) [begs the question]

- *R. A. V.* allowed for an exception for "particularly virulent" expressions, but this one isn't it.
- "As I see the likely significance of the evidence provision [in the VA statute], its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." (385)
- "One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance." (385)
- "To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas." (386)

Dissent: Thomas

- Believes that "the majority errs in imputing an expressive component to the activity in question." (388)
- Statute bans conduct, not expression. (394)
- KKK is popularly understood as a terrorist organization; even segregationist VA adopted an anti-cross-burning statute because of the violence that usually accompanied it.
- No problem with prima facie evidence element; it's just an inference, not a strict presumption that can't be changed by rebuttal evidence.
- "As explained [above], *not* making a connection between cross burning and intimidation would be irrational." (397)
- Some conduct essentially satisfies the "intent" element presumptively. (Possession of drugs with intent to deliver)

Commentary:

- Note the use of context to determine SUBJECTIVE intent:
  "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." (367)

- Also: really what was wrong was the interpretation of the prima facie provision *given to the jury* in Black's case. On remand, maybe it could be interpreted differently; so maybe it doesn't need to be stricken from the rulebooks or rewritten. *(Scalia: "Now this is truly baffling. Having declared, in the immediately preceding sentence, that [the VA statute] is 'unconstitutional on its face,' ibid. (emphasis added), the plurality holds out the possibility that the VA-SC will offer some saving construction of the statute. It should go without saying that if a saving construction [of the statute] is possible, then facial invalidation is inappropriate." 379)*

Legal Writing Notes:

- O'Connorism, citing book:
  W. Wade, The Fiery Cross: The Ku Klux Klan in America 48-49 (1987) (hereinafter Wade).
- Citing an unusual concurrence:
  ***Post*, at 385 (opinion concurring in judgment in part and dissenting in part).**
- Scalia on interpretation: ***ut res magis valeat quam pereat***: "it is better for a thing to have effect than to be made void." (If you can come up with a construction that works, that's better than striking down the law because your interpretation was unconstitutional on its face.)